No. 84-1340

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

WENDY WYGANT, SUSAN LAMM, JOHN KRENKEL, KAREN SMITH, SUSAN DIEBOLD, DEBORAH BREZEZINSKI, CHERYL ZASKI, and MARY ODELL,

Petitioners,

v.

JACKSON BOARD OF EDUCATION, Jackson, Michigan, and RICHARD SURBROOK, President; and DON PENSION, ROBERT MOLES, MELVIN HARRIS, CECELIA FIERY, SADIE BARHAM, and ROBERT F. COLE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENTS

JEROME A. SUSSKIND
JEROME A. SUSSKIND, P.C.
2530 Spring Arbor Road
Jackson, Michigan 49203-3696
(517) 787-5340
Attorney for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. May the responsible local school board—after complaints, careful investigation, and full deliberation—adopt a faculty integration program as part of an overall effort to provide an integrated system of public schooling, particularly in view of a history of chronic underrepresentation of minority schoolteachers and a plausible showing of past discrimination on the part of the board with respect to staff as well as students?

2. Is the particular collective bargaining provision on teacher lay-offs—which was carefully tailored in negotiations between the board and the teachers' certified representative so as to implement the board's laudable integration effort during a difficult time of declining enrollment and to distribute the burden of lay-offs equally among minority and non-minority teachers in order to avoid stigmatizing any teacher as inferior or unqualified —barred by Section 1 of the fourteenth amendment?

3. Was the district court correct in denying plaintiffs' motion for summary judgment and in granting the Jackson Board of Education's motion for summary judgment?

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STATEMENT OF THE CASE

Petitioners' statement of the case is incomplete and does not contain all that is material to the consideration of the questions presented, as is required by Supreme Court Rule 34.1(g). Petitioners ignore the procedural posture and undisputed record below when the trial court ruled on the cross-motions for summary judgment and when the Court of Appeals affirmed. Many of the "facts" set forth in Petitioners' brief are drawn from "Petitioners' Lodging" in this Court and find no support in the record of this case.[1]

[1] In the text of our statement of facts, we therefore set forth the prior proceedings and record made below on the cross-motions for summary judgment. Like the District Court, *Wygant v. Jackson Board of Education*, 546 F. Supp. 1195, 1197-99 (E.D. Mich. 1982) and appeals court, *Wygant v. Jackson Board of Education*, 746 F.2d

A. Prior Proceedings

Petitioners, who are laid-off Jackson, Michigan public schoolteachers, filed their complaint in the District Court in 1981, alleging violations of their civil rights under 42 U.S.C. §§ 1981, 1983, and 1985, and of the fourteenth amendment. No answer was filed, because the Jackson Board of Education moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) or, alternatively, for summary judgment under Fed. R. Civ. P. 56. Petitioners also moved for summary judgment. There was no discovery and no depositions or admissions of fact under Fed. R. Civ. P. 29. No evidentiary hearing was held, and no facts were contested by affidavit or other evidence.

However, during oral argument on the cross-motions, Petitioners explicitly conceded the facts as set forth in the Jackson Board's summary judgment papers (Tr. of 2/23/82 hearing, at 5-6); while Petitioners argued that the court should draw certain inferences from these facts, they never asserted any other facts concerning the history or purposes of the lay-off provision which they are attacking. Indeed, when a single oral remark of school board counsel was momentarily questioned by Petitioners' attorney at the hearing, he prefaced his inquiry with the comment that "I thought we didn't have a dispute on

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1152 (6th Cir. 1984), we proceed on the understanding that in the Courts below, the Petitioners did not dispute the operative facts set out in our summary judgment papers, though we realize that each side has drawn different inferences from them. These undisputed facts demonstrate that a plausible showing that there had been prior discrimination against black students and teachers in the Jackson Public Schools provided the context for the Jackson Board's ongoing desegregation effort, of which the challenged lay-off provision is an integral part. In footnotes, we add the underlying facts of public record which belie Petitioners' claims in this Court that there has never been any prior discrimination in the Jackson school district. We have asked the Clerk of each federal or state tribunal or agency that holds these records to transmit certified copies to the Clerk of this Court.

the facts" (*id.* at 6).[2] The facts contained in the Jackson School Board's summary judgment motion brief were thus undisputed, as District Judge Joiner stated in his opinion, *Wygant v. Jackson Board of Education*, 546 F. Supp. 1195, 1197 (E.D. Mich. 1982).

The District Court dismissed Petitioners' asserted federal claims. Based upon the undisputed facts, Judge Joiner ruled that the lay-off provisions of the collectively bargained contract were substantially related to the constitutional objectives of remedying past discrimination, correcting substantial and chronic underrepresentation of minority staff, and providing for an integrated system of schooling. 546 F. Supp. at 1201-02. Petitioners appealed, but the Sixth Circuit Court of Appeals affirmed. *Wygant v. Jackson Board of Education*, 746 F.2d 1152 (6th Cir. 1984). The Court of Appeals held that the "school board (and bargaining representative of the teachers) have a legitimate interest in curing the past racial isolation of black teachers in the school system." 746 F.2d at 1157. Both the majority and concurring opinions also noted approvingly the procedural safeguards inherent in such a collectively bargained-for lay-off provision. *Id.* at 1158-59, 1161. *Certiorari* was granted by this Court on April 15, 1985.

B. Undisputed Facts from District Court Brief [3]

"In the school year 1950-51 the Jackson Public Schools hired 48 new teachers; in 1951-52, 58 new teachers; in

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[2] Similarly, school district counsel Susskind stated at the hearing that "I don't believe, in either of our briefs, we set forth any fact that would be of any substantial nature that would show any disagreement. There is no issue to try before this Court." (Tr. 5-6.)

[3] All of the facts recited below were set forth in the brief supporting the Jackson Board's motion for summary judgment in the district court. Both the district court, 546 F. Supp. at 1197, and the Court of Appeals, 746 F.2d at 1157, proceeded on the understanding that these facts were not disputed, based on Petitioners' concession to this effect at the hearing on the summary judgment motions. The text of this brief therefore quotes *verbatim* from the statement

1952-53, 83 new teachers and in 1953-54, 61 new teachers were added to the staff. Carrie Hannan was among the 61 newly hired in 1953-54 and she became the first black teacher hired in Jackson. At that time the system had 9,966 students and 355 teachers. The pace of minority hiring was slow from 1953 to 1961. As of the latter date, ten members of a teaching staff of 515 were minority members for a minority ratio of 1.8 percent. The student enrollment had climbed to 12,611 by 1961.

"In the school year 1968-69, black students made up 15.2 percent of the total student population in the Jackson Public Schools, black members of the faculty constituted 3.9 percent of the total teaching staff.

"Jackson integrated its two senior high schools in 1963, and in the spring of 1969, with the building of the Northeast Junior High School, the district integrated the four junior high schools. The city-wide proportion of minority to majority was then established in the four junior high schools, and since those junior high schools fed into the two senior high schools, racial balance was substantially achieved in the secondary schools.

"The district then turned its efforts toward integration of the elementary schools. Various complaints had been filed with the Michigan Civil Rights Commission by the Jackson NAACP alleging segregation of elementary schools as well as discriminatory treatment of minorities in staff hiring and placement.[4] Efforts to integrate the elementary schools and to set up increased minority hiring were prompted, in part, by these complaints.

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of facts in the Board's district court brief supporting its summary judgment motion; the footnotes appended are from sources in public records which we have asked the appropriate court or agency clerks to furnish to this Court, *see supra* note 1. Copies of most of the materials cited in the footnotes may also be found in Respondents' separate Lodging with this Court.

[4] In April, 1969, the Jackson branch of the NAACP filed a detailed complaint with the Michigan Civil Rights Commission (Complaint No. 6585) alleging that the Jackson Public Schools were engaging in a variety of racially discriminatory practices. The complaint specifically asserted that "The Jackson Public Schools are discriminatory in hiring practices." In addition, the NAACP asserted that there was discrimination in discipline, curriculum, and relations with the parents of black students. The NAACP complained as well about the attitudes of the virtually all-white teaching staff, asserting that lower black student achievement was occurring because "teachers have lower expectations of black students . . . [and] teachers and administration interact negatively with black students on the basis of preconditioned methods and techniques of dealing with black students." The complaint asserted that "the counseling program is discriminatory; that counselors are not sensitive to the needs of black students; that counselors do not relate to realizing the educational . . . potential of black students."

The Commission's investigation into these charges revealed substantial evidence of intentional segregation and discrimination, including in hiring and assignment of teachers. *See, e.g.*, Preliminary Investigation Report, June 16, 1969, at 8. The Superintendent of Schools acknowledged that the "imbalance" of black teachers in the system was unacceptable, but argued that final hiring decisions were made by the principals of the various schools; other evidence suggested that the system's central personnel office was deliberately steering black applicants to the predominantly black schools. The results were clear: Eight of the nine all-white schools had all-white faculties (Cascades, Dibble, Firth, Columbia, Huntington, Ridgeway, Sharp Park, and Trumbull), while half of all the black teachers were concentrated in just two schools (McCulloch and Helmer) whose pupil enrollments were 72% and 79% black, respectively. (*See id.*, exhibits 14 and 19.) The Commission's investigation resulted in the conclusion that "*each* of the allegations as stated in the complaint can be substantiated . . ." (emphasis supplied).

In the face of these findings, the Jackson School Board agreed on September 10, 1969 to undertake an ongoing program to integrate the school system, which the Commission approved. This agreement contained specific provisions dealing with each of the NAACP allegations which the commission's investigation had sustained. With regard to its employment practices, the Board agreed to

> [t]ake affirmative steps to recruit, hire, and promote minority group, teachers and counselors as positions become available and pursue other programs now in progress to provide equality of opportunity.

(Notice of Disposition, ¶ II(5).)

"To facilitate the accomplishment of these goals, the superintendent formed a Professional Staff Ad Hoc Committee, which made a preliminary report in October, 1969. That report included a priority recommendation that within a year each of the 22 elementary schools in Jackson should include at least two minority members on the school staff.[5] The Superintendent of Schools and the Executive Secretary of the Jackson Education Association (JEA) served as members of the Committee. The JEA had served as collective bargaining representative for all teachers in Jackson since 1966.

"At the time of this recommendation by the Ad Hoc Committee, only three of the 22 elementary schools had at least two minority teachers on the staff. To implement the recommendation at that time, the system would have had to immediately hire some 40 additional minority teachers.

"A Citizens Schools' Advisory Committee was then formed, with various subcommittees. The Committee studied all aspects of integration, including teacher hir-

[5] The committee concluded that an increase in the number of minority teachers was essential for the education of white as well as black students:

> Jackson needs more qualified minority group teachers, administrators and counselors . . . Minority group students . . . need to associate with persons of their own ethnic extraction who have proven levels of achievement. White students have to grow up in schools where successful minority group professional people are more frequent because the attitudes these students form in their school years are the attitudes they carry through life.

Racial Subcommittee Report, October 16, 1969, p. 1.

The Committee also concluded that minority teachers were deterred from working in Jackson because of community hostility and housing discrimination, and recommended that affirmative steps be taken to deal with those problems and to recruit minority teachers. *Id.*

ing and training.[6] A Professional Council was also formed pursuant to the collective bargaining agreement. The Professional Council was made up of an even distribution of administrators and representatives of JEA. Some 50 percent to 60 percent of council discussions during this period were involved with integration problems. In the words of the then Superintendent of Schools, 'the leadership of the JEA always indicated a sincere commitment to the same basic goals that the Board of Education had adopted with reference to development of a completely integrated school system.'

"In November of 1971, the Minority Affairs Office of the Jackson Public Schools recommended to the members of the racial subcommittee of the Citizens Schools' Advisory Committee the increased recruitment of minority teachers plus increased protection of minority teachers from layoff.[7] At that point in time, 15.9 percent of the

[6] In May, 1970, this second committee appointed by the school board issued a more detailed set of recommendations for the integration of the elementary schools. The method to be followed for integrating the students was, as in other communities, a matter of considerable controversy. The committee itself favored "the adoption of total racial integration as soon as possible," a step that it concluded would require busing. *See* Plaintiffs' Exhibit No. 2, *Jackson Education Association v. Board of Education of Jackson Public Schools*, No. 4-72340 (E.D. Mich. 1976) (hereafter *"Jackson I"*), "Elementary Redistricting Recommendation," at 2. But the committee found that the elementary school principals did not support "total racial integration of the elementary schools at this time" and that a large majority of the parents were "strongly opposed" to busing. Accordingly, the majority of the committee, over a number of vigorous dissents (*see id.*, "Addenda to Redistricting Subcommittee Report, comments of Mary Ann Alber, Alonzo Littlejohn, Carl Breeding, Bruce Wilkins), proposed a desegregation plan that involved no busing. The committee also urged, without dissent, the "integration of . . . the teaching staff throughout the district." *Id.* at 3; *see also id.* at 4 (urging "improving the mix of teachers").

[7] During the period from 1969 to 1972 when the problem of student desegregation was still under discussion, the Board took steps on its own to deal with the lack of black teachers caused by its prac-

students were classified as members of minorities, whereas only 8.8 percent of the faculty were minority members. The minority-majority faculty ratio for 1971-72 had increased from a 1970-71 ratio of 5.5 percent. This increase was a reflection of the intensified affirmative action hiring policy instituted by the district wherein the system was actively seeking black teaching candidates.

"The successful recruitment of minority teachers continued to be burdened, however, by economic circumstances and decreasing student enrollment. The straight seniority system mandated by the then existing collective bargaining agreement imposed the primary burden of layoffs on the 'last hired.' The 'last hired' were the very minority teachers the system was trying to recruit and retain. The affirmative action program was impeded by the effects of the seniority system.[8]

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tices, steps that would clearly be necessary if the 1969 goal of two minority teachers in each school were to be achieved. Affirmative steps were taken to recruit and hire more minority teachers. *See, e.g.*, Tr. of 3/31/76 hearing, *Jackson I* (hereafter "Tr. *Jackson I*") at 18-19 (testimony of Kirk Curtis, Executive Secretary of Jackson Education Association); Deposition of Lawrence Read, *Jackson I*, (hereafter "Read Dep.") at 5, 22. Between the 1967-68 school year and the 1971-72 school year, the number of minority teachers more than doubled, from 21 to 50. *See* Plaintiffs' Exhibit No. 15, *Jackson I*. The problems which ultimately gave rise to Article XII occurred in 1970 and 1971, when faculty lay-offs became necessary. As a result of the Board's past hiring practices, a substantial majority of the district's non-white teachers had less than three years of seniority. Under the collective bargaining agreement in effect prior to 1972, however, lay-offs were to be made on the basis of seniority; the 1970 and 1971 lay-offs thus substantially defeated the Board's recent efforts to recruit and hire more non-white teachers. The effect of that seniority rule, the school superintendent testified, was to "literally wipe out all the gain that had been made in terms of affirmative action . . . ." Read Dep. at 24. Minority teachers recruited and hired one year were simply laid off the following year.

[8] By the beginning of 1972 the leaders of the teachers' union, with the acquiescence of its members, had already begun to prepare possible alternatives to the seniority lay-off rule because the union

"In January of 1972, on the eve of commencement of negotiations for a new collective bargaining agreement, Walter Norris of the Minority Affairs Office of the Jackson Public Schools issued a questionnaire to all teachers, wherein the Superintendent solicited their views as to the system layoff policy. In the questionnaire he posed two specific alternatives, to-wit: continuation of a straight seniority system, or a freeze of minority layoffs to ensure retention of black teachers in exact ratio to the black student population.

"The questionnaire was not well received by the teachers or the Jackson Education Association. Ninety-Six percent of the teachers expressed a preference for the straight seniority system, and the JEA, feeling that the questionnaire constituted illegal interference with the bargaining process, threatened the filing of an unfair labor practice charge.[9]

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recognized that a modification of the rule was necessary to bring about integration of the staff. Tr. *Jackson I*, at 29 (testimony of JEA Executive Secretary Kirk Curtis). In February, 1972, the Jackson Board received a committee report recommending a desegregation plan for the fall of 1972, a proposal which included, as had the 1969 report, a goal of having no less than two minority teachers in every elementary school. Plaintiffs' Exhibit No. 7, *Jackson I*, at 2. The Board adopted that plan in March of 1972, *see* Read Dep. at 46, even though at that time there were still too few minority teachers in the system to meet that stated goal, Tr. *Jackson I*, at 27, and despite the fact that the minority teachers who were in the school district were particularly vulnerable to the seniority lay-off rule then contained in the Board's collective bargaining agreement.

[9] JEA Executive Secretary Curtis testified:

> . . . I felt that Mr. Norris was serving a union membership about what the union's proposals ought to be at the bargaining table. I felt it a very clear unfair labor practice and I so informed the Board. And in addition, we took the action of informing our building representatives at that point to instruct the membership to respond with B, which they did, about 93 percent.

Tr. *Jackson I*, at 25. *See also id.* at 29 ("In fact, at the time we indicated to the membership how we decided to have them vote we had even at that point, had been working on alternatives [to lay-offs

"In recognition of the serious disagreement on this issue, preliminary negotiations were commenced in the early spring of 1972.

"To correct this situation and to 'end up with a truly integrated school system,' representatives of the Board and the Jackson Education Association reached tentative agreement in the spring of 1972 on various clauses which ensured increased minority hiring and increased protection from layoff for the newly hired minority teachers. The layoff provision represented a compromise between a standard plant-wide seniority system and a rigid freeze for a certain percentile of minority teachers.[10] The collective clauses were eventually memorialized by an agreement which retroactively became effective on July 1, 1972.

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based solely on seniority], with their knowledge"). The union subsequently negotiated a modification of seniority-based lay-offs, *see infra*.

[10] The school superintendent and the union leader who had participated in the framing of Article XII gave similar explanations for that clause. First, Article XII was regarded as an "integral part" of the desegregation plan; without the limited protection it afforded to minority teachers, it would have been impossible to achieve the school Board's repeatedly expressed goal of desegregating the faculty and placing two minority teachers in each elementary school. *See* Read Dep. at 69 (without the lay-off provision "[e]verything else is in danger, if not destroyed"); Tr. *Jackson I* at 20 (change in lay-off rules needed "to prevent the fruits of recruitment from being wiped out the following spring"), 42 (testimony of JEA Executive Secretary Curtis). *See also*, Proposed Joint Pre-Trial Order, *Jackson I*, at 2 ("the active minority recruitment program was . . . suffering from the impact of continuing layoffs dictated by economic circumstances and magnified by the straight systemwide seniority system mandated by the existing collective bargaining agreement. To correct this situation, and to 'end up with a truly integrated system,' the board and the Jackson Education Association" agreed to adopt Article XII).

Second, the limited protection afforded by Article XII was regarded as essential to the school Board's future ability to attract and hire minority teachers. The Jackson School Board, like school boards throughout the country, hires most of its teachers from col-

"The key layoff language was contained in Article XII, B., 1, of the JEA-Jackson Public Schools agreement covering the period of July 1, 1972 through August 31, 1973.

"Although tentative agreement was reached on this issue in the spring of 1972, final ratification did not occur until the late fall of 1972.

"In February of 1972, the system experienced 'a violent (racially motivated) explosion at Jackson High School, probably the worst we had had,' which featured fighting and rioting among the students. On February 17, 1972, the Citizens Advisory Committee recommended that all elementary schools be desegregated as of the fall of 1972

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leges outside of, and far from, the city of Jackson itself. Read Dep. at 73-75. Many of the minority teachers whom Jackson wanted to attract were from southern colleges, and those teachers were understandably reluctant to move all the way to Michigan if they faced an imminent threat of lay-off. The lay-offs of large numbers of minority teachers in 1970 and 1971 made recruiting such teachers far more difficult, Tr. *Jackson I* at 20, and the abolition of Article XII would have "cripple[d] . . . greatly" the Board's efforts to recruit minority teachers, *id.* at 56; *see also id.* at 55 (convincing minority teachers to move to Jackson from the south "particularly difficult" without Article XII).

Third, both school officials and the teachers' union in Jackson regarded the presence on the faculty of a substantial number of minority teachers as essential to providing an effective education, particularly for minority students, Tr. *Jackson I* at 56 (testimony of JEA Executive Secretary Curtis):

> It is a great deal of help to both students and other staff in a particular school to have a mixed staff of minority teachers, black teachers on staff. Gives the black students someone they can, you know, have an affinity with if they can look up to, if you will and it gives, I think if anything, more importantly more accurate and better picture if you will of minority people to white students. . . .
>
> Q. . . . [w]hen you arrived at the conclusion to have the affirmative action program . . . you did that for education reasons?
>
> A. Well, yeah. I guess you could say that part of the educational setting is to present a multi-cultured environment. Children don't see black people as maids and menials, that they saw them as professional people. And that . . . is education.

and that racial balance be achieved on each elementary staff with a minimum of two black teachers to be included on the staff at each building. The Board, after considerable agonizing, adopted the recommendations, proceeded to prepare the community for the process, and made the necessary staff assignments.

"The elementary schools were then integrated in the fall of 1972.[11] The teachers reported to work even though final agreement had not been reached at the bargaining table. Services were not withheld by the JEA at the outset of school because it was felt that such action might be interpreted as a strike against integration. A strike eventually occurred in the late fall, but final agreement was ultimately reached.

"At the teacher ratification meeting, some protests were received in regard to the proposed contract layoff policy. Some critics claimed that the compromise represented a destruction of the teacher seniority system. The leadership explained that a staff racial mix was educationally sound and that the system needed black teachers. It was also noted that the new layoff policy was partially de-

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[11] In adopting the 1972 elementary school desegregation plan, and in pressing for a provision such as Article XII to assure the retention of sufficient minority teachers to implement the faculty aspects of that plan, school officials perceived that their action was required by federal law. Read Dep. at 65-68. By the spring of 1972 a number of other school districts in Michigan had been named in federal desegregation suits or were already under federal court orders. *Id.* at 43. In a written statement on the desegregation plan circulated to parents in April of 1972, the Jackson School Board explained why it was taking voluntary action rather than waiting for a court order:

> Waiting for what appears the inevitable only flames passions and contributes to the difficulties of an orderly transition from a segregated to a desegregated school system. Firmly established legal precedents mandate a change. Many citizens know this to be true. Waiting for a court order emphasizes to many that we are quite willing to disobey the law until the court orders us not to disobey the law.

Plaintiffs' Exhibit No. 8, *Jackson I*, question 4.

signed to correct past discriminatory policies. The teacher's leader stated that 'every single teacher accepted the premise that the presence of minority teachers was helpful.' The teachers ratified the contract.

"According to the Executive Secretary of the Jackson Education Association, the negotiation and ratification of the layoff language was the 'most difficult balancing of equities that he had ever encountered.' [12]

Shortly after ratification of the contract in the fall of 1972, the Superintendent of Schools, Dr. Lawrence Read, was fired.

"Layoffs were again necessary in the spring of 1973. The contract language was followed. In the summer of 1973, a new collective agreement was under negotiation. Following another teacher strike in the fall of 1973, a contract was completed. In spite of radical changes in personnel on the Board of Education since the spring of 1972, the same affirmative action and layoff language continued in the successor agreement. (Article VII, E, F and Article XII).

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[12] In the 1972 collective bargaining negotiations between the Board and the JEA, the Board had proposed that there be a complete freeze on the laying off of minority teachers, at least until the proportion of minority teachers reached 15% or 17%. Read Dep. at 28 ("[T]he business of not dismissing any minority teachers was certainly paramount in our objectives that year in negotiations, and I think that we would have like to have some kind of language in the contract that would have prohibited this"); Tr. *Jackson I* at 31. The union, however, strongly opposed this proposal. Read Dep. at 28-29. Article XII was ultimately agreed upon in the spring of 1972 as a compromise method of providing *some* protection for the newly hired minority teachers in order to permit implementation of the desegregation plan without placing on white teachers the entire burden of any lay-offs. *Id.* Although it had opposed the freeze, the union strongly favored Article XII. The union members were virtually unanimous in agreeing that there was a need for more black teachers, and Article XII was perceived as necessary to bring that about and to achieve the widely accepted goal of "having minority teachers in every building" and "to correct past problems." *See* Tr. *Jackson I* at 42-43.

"In April of 1974, the Jackson Public Schools announced the impending layoff of 75 teachers, 19 of whom were minority personnel. The ratio of minority personnel on the staff at said time was 11.1 percent. Ignoring the contract language and the ratio figure, the Board chose to retain all tenured teachers and failed to maintain the percentage of minority personnel which existed at the time of the layoff. As a consequence of this action, the minority teachers, through Linda Benson, filed a complaint in Federal District Court, alleging that the actions of the defendant, Jackson Public Schools, violated the Plaintiffs' civil rights. Concurrent with this claim was a request that the Federal District Court assume pendente jurisdiction over the breach of contract claim.[13] The Federal District Court, through Judge DeMascio's memorandum opinion and order dated January 12, 1977, refused to accept pendente jurisdiction over the contract claim.[14] This order was subsequent to a trial in the matter in which the aforesaid facts were proved and later

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[13] The Jackson Education Association brought the *Jackson I* suit in federal court together with two black teachers laid off as a consequence of the Board's non-compliance with Article XII. In Count I of their complaint, these plaintiffs asserted a federal cause of action, claiming that Board practices had the *effect* of discriminating against blacks; prior to trial, the plaintiffs amended this count to allege a violation of Title VII. Count II requested the federal court to exercise pendent jurisdiction over plaintiffs' state law contract claim seeking to enforce Article XII.

[14] The court ruled that the plaintiffs had presented their federal claim based on statistical disparities and effects solely as a jurisdictional predicate for resolution of their pendent state law contract claims, that "the proofs presented at trial were not directed at establishing violations" of federal law, and that instead the "dispute centers about a conflict between the provisions of a collective bargaining agreement and state law as interpreted by the Jackson Board." (J.A. 37.) Because any federal claim was advanced "to set forth a pretextual jurisdictional basis" (*id.*), Judge DeMascio refused to rule on the pendent state law claims and dismissed the case (*id.* at 37, 39.) Rather than pursue an appeal in the Sixth Circuit (J.A. 40), the Jackson Education Association eventually proceeded to state court to pursue the state law claim. (J.A. 40.)

stipulated to in *Jackson Education Association, Inc. v. Board of Education of the Jackson Public Schools*, No. 77-0011484 CZ (Jackson County Circuit Court, August 31, 1979).

"In this Circuit Court case, Judge Britten entered a declaratory judgment against the defendant, Jackson Public Schools, on grounds of the breach of contract, and thereby found the minority Plaintiffs entitled to relief and damages. In this opinion, Judge Britten held the affirmative action plan to be constitutional and not in violation of the Teachers Tenure Act. MCLA 38.105; MSA 15.2005.[15] As a result of this opinion, the defendant, Jackson Public Schools, formed its present conduct requiring the application of the affirmative action clause when layoffs were necessary at the close of the 1981-82 school year. Consequently, the laid-off white Plaintiffs filed the instant suit alleging the unconstitutionality of the affirmative action clause under the Fourteenth Amendment. . . ."

SUMMARY OF ARGUMENT

In 1972, following four years of investigating the causes and consequences of racial segregation of staff and elementary students, the Jackson Board of Education chose voluntarily to integrate its elementary schools and faculty. In so doing the Board showed its willingness to obey the spirit of this Court's directives in *Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*), *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), and *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). Instead of litigat-

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[15] Judge Britten declined to hold that race-conscious affirmative action could only be promulgated by a court. Instead, he ruled that the democratic process and collective bargaining were the preferable method for resolving the difficult issues posed by efforts "to achieve the end of a truly integrated school system" (J.A. 42) and to overcome the effects of "societal discrimination." J.A. 49, 51-53. The state court therefore entered a declaratory judgment that the Board had violated Article XII and directed the Board to pay damages to the black teachers injured by that breach of contract.

ing the issue for years and eventually being ordered by the federal courts to take specific action, as happened in many neighboring school districts, the Jackson Board chose to conform voluntarily to its constitutional obligations as it understood them.

In light of this history, as well as of its sincere belief in the educational soundness of its goals, the Jackson Board of Education and the Jackson Education Association collectively bargained contract provisions that would promote the hiring and retention of minority teachers. As the responsible local education agency under state law, the democratically elected Jackson Board is a proper body to make this determination as to the consequences of its past discrimination and to establish ongoing desegregation and educational goals for its faculty and students. Such voluntary, good-faith desegregation efforts, contrary to Petitioners' contentions, are fully supported by this Court's prior rulings on appropriate remedies and permissible affirmative action. *See infra* Argument I.

Moreover, the particular race-conscious remedies implemented by the Jackson Board were fairly bargained with the teachers' certified representative. They were tailored to avoid dismantling the Board's ongoing affirmative effort to thoroughly desegregate the system of schooling while providing for the sharing of the burdens of lay-offs among minority and non-minority teachers without stigmatizing any individual or group as inherently inferior. *See infra* Argument II.

We recognize that this case arrives in this Court in a troublesome procedural posture because of the trial court's ruling on the cross-motions for summary judgment without the benefit of an answer or evidentiary hearing. We submit, however, that the lower courts properly understood that the Petitioners did not contest the basic facts below; these facts constituted at least a plausible showing of historic discrimination by the Jackson Public Schools against blacks, the effects of which were continuing to be felt by students in the school system. Thus, the lower

courts properly concluded that the use of reasonable, race-conscious criteria in retaining minority teachers was substantially related to overcoming the consequences of plausible past discrimination and assuring effective desegregated education in the Jackson Public Schools. *See infra* Argument III.

ARGUMENT

I. THE JACKSON BOARD OF EDUCATION MAY, CONSISTENT WITH THE FOURTEENTH AMENDMENT, ADOPT ARTICLE XII (THE RACE-CONSCIOUS LAY-OFF PROVISION) AS PART OF A PLAN TO REMEDY PRIOR DISCRIMINATION AND TO ACHIEVE THE EDUCATIONAL BENEFITS OF SCHOOL INTEGRATION FOR ITS STUDENTS.

The Jackson Board of Education believed that segregation in the elementary schools was caused, at least in part, by past policies of the Board and staff. This view was supported by a four-year study, including consideration by a "blue ribbon" citizens' advisory committee and an Ad Hoc Committee comprised of teachers and administrators, by complaints filed by the NAACP, by an investigation of the Michigan Civil Rights Commission, and by the Board's knowledge of its prior practices concerning teacher hiring and student and teacher assignment.[16]

Recognizing that 90% of the black students were housed in two black elementary schools, that the majority of the very small number of elementary-level black teachers were in those black schools, that black teachers had previously been chronically underrepresented on the Jackson staff, and mindful both of this Court's mandates in

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[16] *See Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576, 2589 (1984) (O'Connor, J., concurring) (stating importance of presenting "plausible case of discriminatory animus" in adoption of seniority system to justify consent decree modification in *Stotts*); *United Steelworkers of America v. Weber*, 443 U.S. 193, 211 (1979) (Blackmun, J., concurring) (suggesting "arguable violation" standard for voluntary affirmative action).

Brown II, *Green*, and *Swann* and of the educational value of racially integrated education, the Jackson Board reached the logical conclusion that its elementary schools should at last be desegregated. Having voted to adopt a pupil desegregation plan, the Board at the same time determined to integrate the faculty.

The hiring, assignment and lay-off goals of the faculty integration plan were set forth in the labor agreement which was collectively bargained with the teachers' union to support the desegregation plan. On no occasion have the school system's hiring or assignment goals been challenged; this litigation has dealt solely with the lay-off provision, Article XII, which has been included by agreement of the parties in each subsequent contract.[17] The total number of teachers in the district has been declining as the total number of students in the school district declines. Absent Article XII, the district therefore would have very few minority teachers and the Jackson Board's effort to integrate its school system would be frustrated. The fourteenth amendment does not require this result.

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[17] At page 15, note 14 of Petitioners' Brief, an issue is apparently raised relative to "labor market figures." *See also* Pet. Br. at 17 n.15. This issue has no relevance to the case at bar since Petitioners have on no occasion sought to state a cause of action relative to the affirmative hiring provision, Article VII; their only mention of that article appears in paragraph 8 of their Complaint.

If there were a relevant dispute as to the appropriate labor market for hiring, however, the Jackson Board is prepared at any trial to demonstrate that the Jackson Public Schools have sought teachers (black and white) from a broad geographical area, principally out-of-state, and would also be able to prove that from an economic position, such districts as Kalamazoo, Grand Rapids, Detroit, and Lansing have been able to offer their teachers higher salaries and are culturally more attractive, placing Jackson at a competitive disadvantage within the in-state sub-market. Petitioners' failure to raise a hiring issue makes this inquiry into the relevant labor market unnecessary.

A. A Local School Board Is A Proper Governmental Body To Evaluate The Effects Of Its Past Conduct And The Need For An Integrated System Of Schooling, And To Adopt and Implement Effective Measures, Including Race-Conscious Measures, To Achieve These Ends. The Decision Of The Jackson Board Of Education To Integrate Its Schools And Faculties And To Collectively Bargain For A Reasonable Limitation On Minority Teacher Lay-Offs While That Goal Is Being Pursued Was Proper.

As demonstrated above, the record in this matter establishes that the lay-off provision, Article XII of the collective bargaining agreement, which Petitioners attack, is an integral part of a comprehensive voluntary effort by the Jackson Board of Education to integrate its public schools. Whatever may be the case with respect to other kinds of public agencies, the decisions of this Court leave no room to question either the competence or the obligation of local public school authorities to recognize and evaluate their own discriminatory conduct or that of their predecessors in office, and to develop and implement "whatever steps are necessary" to extirpate the remaining effects of that conduct, including taking such race-conscious steps as may be necessary.

In *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*), the Court determined that classifications that harm an oppressed group are likely to be the result of invidious discrimination or prejudice. The Court in *Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*) focused on the need to undo the systematic effects of longstanding discrimination against blacks in public educational institutions, in order to assure a transition to a unitary system of schooling. In *Brown II*, it is affirmatively stated that the local school board is the proper entity to determine the need to integrate and is under a duty to do so:

> Full implementation of these constitutional principles may require solution of varied local school problems. *School authorities have the primary re-*

> *sponsibility for elucidating, assessing, and solving these problems*; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.

Brown II, 349 U.S. at 299 (emphasis supplied), quoted in *Swann*, 402 U.S. at 12.

Thus, it is well settled that the state and its local school board instrumentalities have a duty to remedy the consequences of their discriminatory conduct, *see, e.g.*, *Milliken v. Bradley*, 433 U.S. 267, 281 (1977); *Green v. County School Board of New Kent County*, 391 U.S. 430, 437-38 (1968), and that the duty to integrate is a continuing and affirmative one. *See, e.g., Columbus Board of Education v. Penick*, 443 U.S. 449 (1979).

The precedents cited above amply support the actions of the Jackson Board of Education in this case. Plausibly believing from the facts put before it that the elementary schools were segregated, as to both pupils and teachers, supported by four years of study and by a Michigan Civil Rights Commission investigation, and mindful of this Court's mandates, the Jackson Board acted reasonably in 1972 in integrating the elementary schools and staff. Considering its first-hand knowledge of the facts, the Jackson School Board was justified in concluding that its prior student assignment and faculty hiring and assignment policies may have contributed to the segregated system of elementary education extant in 1972.[18]

[18] In view of the subsequent judicial decrees against nearby school districts in Michigan and in neighboring Ohio, the decision of the Jackson Board in 1972 voluntarily to integrate its schools on the basis of a comparable factual history as was developed in those cases should be a matter for celebration, not censure. If other school boards had made the same determination as the Jackson Board, the need for wide-ranging court orders might have been substantially lessened. *See Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979); *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979); *Milliken v. Bradley*, 433 U.S. 267 (1977) (Detroit); *NAACP v. Lansing Board of Education*, 559 F.2d 1042 (6th Cir. 1977), *cert. denied*, 438 U.S. 907 (1978); *Oliver v. Michigan State Board of Education*, 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) (Kalamazoo); *Berry v. School District of Benton Harbor*, 442 F. Supp. 1280 (W.D. Mich. 1977).

It then became the Board's obligation to design and carry out steps which would effectively remedy any prior misconduct on its part and establish a fully unitary school system for its students. The Court has described this affirmative duty as one requiring the elimination of all vestiges of school discrimination "root and branch," *Green*, 391 U.S. at 438. In *Swann*, 402 U.S. at 15, 22-31, the Court suggested that a local school board, in making the determination to integrate, should consider a wide range of factors in designing a remedy for the vestiges of prior segregation and discrimination. *Swann* and *Brown II* call for an evaluation by local school boards of the total factual situation presented in each case, and encourage local boards voluntarily to integrate without the necessity of suit either by the government or by individual parents.

In this light, it is not surprising that this Court has consistently recognized that race-conscious policies are frequently "the one tool absolutely essential" for redressing past discrimination, *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 46 (1971), and that school boards may use that tool when integrating voluntarily or under court order. In *Swann*, for example, the Court made it clear that school districts could use race-conscious criteria in student assignment in order to achieve student integration even to the point of requiring that "each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole." 402 U.S. at 16. (Here, the Jackson Board adopted much more flexible approaches to effectively integrate students and staff.)

The Court has recognized that although a blanket prohibition against race-conscious redress of discrimination might seem neutral on its face, like the prohibition in

Hunter v. Erickson, 393 U.S. 385 (1969) it would be far from neutral in its operation. Such a prohibition "would freeze the status quo that is the very target of all desegregation processes," *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971); *see North Carolina State Board of Education v. Swann*, 402 U.S. at 45-46 (stating that "'color blind-[ness]' . . . against the background of segregation would render illusory the promise of *Brown v. Board of Education*").

The Jackson Board of Education, a popularly elected governmental body, chose to come to grips with its own prior history of segregated schooling by adopting a variety of color-conscious programs to integrate its school system, including Article XII of its collective bargaining agreement dealing with teacher lay-offs. Petitioners criticize that decision because, as in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), no judicial finding of discrimination was made in this case. However, as Justice Brennan, in an opinion in which Justices White, Marshall, and Blackmun concurred, stated, *id.* at 364:

> [Any] requirement of a judicial determination of a constitutional or statutory violation as a predicate for race-conscious remedial actions would be self-defeating. Such a requirement would severely undermine efforts to achieve voluntary compliance with the requirements of law. And, our society and jurisprudence have always stressed the value of voluntary efforts to further the objectives of the law. Judicial intervention is a last resort to achieve cessation of illegal conduct or the remedying of its effects rather than a prerequisite to action.

The Jackson Board has acted in accordance with the mandates of this Court. Where a school board voluntarily seeks to comply with a longstanding constitutional mandate to recognize, assess, and remedy its own possibly discriminatory conduct, its good faith and reasonable judgment should not be overruled or second-guessed.

Petitioners and the United States insist, however, that only an adjudication against it of unconstitutional conduct (with all of its attendant collateral consequences) will permit a local school board to undertake race-conscious measures to further integration. The asserted justification for this proposed prohibition on affirmative action programs is that, since our history has been so riddled with the use of racial classification by the majority to exclude, stigmatize and subordinate racial minorities, racial considerations can now never be taken into account by the majority in the process of seeking to remedy the stark and subtle vestiges of past discrimination. But to exclude from constitutional analysis both the historical context and purposes for which racial considerations are used serves neither logic, justice, nor our constitutional heritage. *See Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Bakke*; *Washington v. Davis*, 426 U.S. 229 (1976); *Swann*.

If the Court were to accept the argument of petitioners and the Department of Justice, a school board concerned about the possibility of its own past discrimination would either have to undertake a lengthy recitation of details of its past questionable conduct at a public inquiry or wait until it was successfully sued in court before it could use reasonable race-conscious methods to cleanse its school system of the remaining vestiges of segregation and to provide an integrated education for its students.

In the instant case, the lay-off program merely protects gains in faculty desegregation from dissipation through the lay-off procedure. The parties to the collective bargaining agreement recognized that the Article XII language regarding lay-offs would adversely affect some white teachers, but felt it was necessary in order to protect the gains made through affirmative action hiring. The language was designed to protect against a "Catch 22" situation, wherein minority teachers would be hired, only to be immediately laid off, thereby continuing a pattern of racial exclusion of blacks from the previously segregated Jackson Public Schools.

To deny all use of racial consideration in the remedial context would create the following scenario: governmental actors could choose, in the face of past discrimination or disadvantage, to give preferential treatment to elderly people, military veterans, impoverished people, people from certain geographic localities, and even women, so long as such treatment was, at the most, "substantially related" to an important governmental purpose. *Only racial minorities* would be prohibited from receiving preferential treatment from the majority to remedy past discrimination.[19]

In approving Article XII, the District Court in this case adopted the test established by the Fifth Circuit in *United States v. Miami*, 614 F.2d 1322 (5th Cir. 1980), *modified*, 664 F.2d 435 (1981): "The reasonableness test asks whether the affirmative action plan is 'substantially related' to the objectives of remedying past discrimination and correcting 'substantial' and 'chronic' underrepresentation." *Wygant*, 546 F. Supp. at 1202. As part of the ongoing school desegregation program, Article XII represents a reasonable and effective remedial tool for integrating the Jackson Public Schools. *North Carolina State Board of Education v. Swann*, 402 U.S. at 45-46; *Swann*, 402 U.S. at 25 ("As we said in *Green*, a school

[19] As stated in *Bakke*, 438 U.S. at 368 (Opinion of Brennan, White, Marshall & Blackmun, JJ.):

> Nothing whatever in the legislative history of either the Fourteenth Amendment or the Civil Rights Acts even remotely suggests that the States are foreclosed from furthering the fundamental purpose of equal opportunity to which the Amendment and those Acts are addressed. Indeed, voluntary initiatives by the States to achieve the national goal of equal opportunity have been recognized to be essential to its attainment. "To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment." *Railway Mail Assn. v. Corsi*, 326 U.S. 88, 98 (1945) (Frankfurter, J., concurring).

The interpretation of the fourteenth amendment as allowing some benign uses of race-conscious state action has been supported in several other opinions by members of this Court. *See, e.g., Bakke*, 438 U.S. at 320 (Powell, J.).

authority's remedial plan . . . is to be judged by its effectiveness").

B. Without Regard To Its Own Prior Discrimination, A Local School Board Is A Proper Body To Establish Affirmative, Race-Conscious Educational And Institutional Goals, And The Jackson Board's Action Was Appropriate In This Respect Also.

This Court, in its landmark decision in *Brown I* noted that:

> [E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate a recognition of the importance of education to our democratic society . . . . Today it is a principal instrument in awakening the child's cultural values, and in preparing him for later professional training, and in helping him to adjust normally to his environment.

347 U.S. at 493. In *Swann*, the Court expressly considered and explicitly rejected the argument that the Constitution requires that teachers be assigned on a "color blind" basis. 402 U.S. at 19. In that same case, the Court stated:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. *To do this as an educational policy is within the broad discretionary powers of school authorities*; absent a finding of constitutional violation, however, that would not be within the authority of the federal court.

402 U.S. at 16 (emphasis supplied). The Court repeated this view in *North Carolina State Board of Education v. Swann*:

> [S]chool authorities have wide discretion in formulating school policy . . . . [*A*]*s a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements.*

402 U.S. at 45 (emphasis supplied).

The broad scope of authority to take race into account is, of course, not limited to local school boards or to public agencies. In *Bakke*, 438 U.S. at 320 (Opinion of Powell, J.), the Court held that a medical school had a constitutionally valid interest in achieving an ethnically or educationally "diverse" student body, so that it could give "competitive consideration to race and ethnic origin" in determining admission to medical school. In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the Court approved the constitutionality of a limited affirmative action program where Congress relied on findings of past societal discrimination against minority contractors. And in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), the Court sanctioned the voluntary use of race-conscious practices by private employers and unions to alleviate the continuing barriers to employment opportunities for blacks in the skilled crafts. Here, the Jackson Board's interest in a reasonable affirmative action program is at least as compelling and valid as in *Bakke*, *Fullilove* and *Weber*.

In *Bakke*, as in this case, there was no judicial finding that the University of California at Davis had engaged in any past discrimination, 438 U.S. at 301 (Opinion of Powell, J.); nevertheless, Justice Powell viewed the race-conscious goals, though not the particular device of the University of California plan, as analogous to the Harvard College admissions program:

> [T]he [Harvard Admissions] Committee is aware that if Harvard College is to provide a truly heterogen[e]ous environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers. . . . [Only] 10 or 20

> black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States. . . . [T]he Committee on Admissions is aware that there is some relationship between numbers and achieving the benefits to be derived from a diverse student body. . . .

Id. at 323 (Appendix to Opinion of Powell, J.). The institutional interest and educational needs of the medical school were the bases for Justice Powell's conclusion that the medical school could use race-conscious admissions criteria in order to achieve an "educationally diverse" student body. *Id.* at 315, 320.

Justice Powell noted that a state's interest in facilitating the health care of its citizens and in attaining a diverse student body in its educational institutions could be sufficiently compelling to support the use of racial classifications. 438 U.S. at 310-12. As he stated:

> The fourth goal . . . is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education. . . . Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.

Id. at 311-14. Thus, the fourteenth amendment does not prevent a state or local government from implementing race-conscious measures to meet a sufficiently important government interest. *Bakke*, 438 U.S. at 362-69 (Opinion of Brennan, White, Marshall, & Blackmun, JJ.); *id.* at 314-20 (Opinion of Powell, J.). That principle controls the decision in the case at bar.

The Jackson School Board, as indicated earlier, was concerned both with educational values and the remedial

need to integrate. Even assuming there were *no* black students in the district, the Board's affirmative program for integrating staff still is a valid educational and institutional interest which would justify the race-conscious Article XII under the analysis of Justice Powell in *Bakke*, 438 U.S. at 311-14.

The Jackson Board concluded that white students should be exposed to black teachers and should be prepared to participate in a multi-racial society.[20] Believing that a multi-racial education was an important part of the educational function of the schools, the Jackson Board had added black culture courses to its curriculum, reviewed its other courses for racial bias, and worked hard to promote racial understanding in the community at the same time as it sought to integrate its elementary schools and faculty. This was part of the comprehensive commitment of the Board to an effective system of integrated education.

It is also significant that duly elected representatives of the teachers joined in this effort throughout the collective bargaining process. The Jackson Board was convinced that the presence of black teachers would bring an important perspective to students and faculty, and that such a diverse faculty would be able to relate valu-

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[20] *See Estes v. Metropolitan Branches, Dallas NAACP*, 444 U.S. 437, 451 (1980) (Powell, J., dissenting from denial of certiorari) ("[T]he benefits of attending ethnically diverse schools [are] experience[s] that prepar[e] a child for citizenship in our pluralistic society"); *Washington v. Seattle School District No. 1*, 458 U.S. 457, 495 (1982) (Powell, J., dissenting) ("[C]hildren of all races benefit from exposure to '"ethnic and racial diversity in the classroom"'") [citations omitted]. *Cf. Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission*, 482 F.2d 1333, 1341 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975) (presence of minority employees in visible positions after long exclusion may lessen divisiveness); *NAACP v. Allen*, 493 F.2d 614, 621 (5th Cir. 1974); *Arnold v. Ballard*, 390 F. Supp. 723, 736 (N.D. Ohio 1975), *aff'd*, 12 FEP Cases 1613 (6th Cir. 1976), *vacated and remanded on other grounds*, 16 FEP Cases 396 (6th Cir. 1976).

able experiences and bring new perceptions to the classroom that would contribute to the students' total educational experience and add a needed balance to the faculty and curriculum.[21] Surely, such goals are not constitutionally barred by section one of the fourteenth amendment.[22] If a state university has a compelling interest

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[21] *See Berry v. School District of Benton Harbor*, 467 F. Supp. 721, 744, 748 (W.D. Mich. 1978) (Michigan State Board of Education 1966 Policy Statement and 1977 Guidelines requiring affirmative efforts to attract and hire minority teachers).

In *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), neither the State of Washington, the United States Government, 458 U.S. at 472 n.15, nor any member of this Court contested the notion that the Seattle School District could voluntarily use race-conscious methods to eliminate racially imbalanced schools, even in the absence of a judicial finding of past intentional discrimination, *see* 458 U.S. at 464 n.8. The dissenters in this Court argued that state-level educational policy should be able to override a local school board's voluntary decision to bus students. 458 U.S. at 488 (Powell, J., dissenting). In the present case, there has been no opposition from the state government. In fact, the Michigan Attorney General's office is filing an *amicus* brief on behalf of the State of Michigan and the Michigan Department of Civil Rights.

[22] Using an alternative constitutional approach, the Court could uphold the plan in this case by relying on the thirteenth amendment, which "[w]holly aside from the fourteenth amendment . . . envisions affirmative action aimed at blacks as a race." *Williams v. New Orleans*, 729 F.2d 1554, 1570, 1577 (5th Cir. 1984) (*en banc*) (Wisdom, J., concurring in part and dissenting in part).

The Justice Department, in the United States' *amicus* brief at 11-17, however, offers a stilted historical perspective on the Civil War Amendments which would bar all race-conscious action except of the type ordered by federal courts to provide narrow relief to specific victims of proven specific discriminatory acts. The fourteenth amendment was fashioned and approved by the same Congress that deliberately enacted race-conscious remedies for the primary benefit of blacks (both free blacks and the newly freedmen), as well as their white supporters who were singled out for harassment and oppression by the dominant white majority within several States. *See generally* Dimond, *Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause*, 80 Mich. L. Rev. 462 (1982); Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L.

in admitting a racially diverse student body,[23] it would seem that a local school board has at least as compelling an interest in attempting to secure a racially diverse faculty. Especially in the face of possible prior discrim-

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Rev. —— (June, 1985, forthcoming). This is hardly coincidental, for one of the chief purposes of the fourteenth amendment was to constitutionalize the remedies which the Thirty-Ninth Congress had already adopted in implementing the thirteenth amendment. *Id.* *See also* Briefs of *Amici Curiae* NAACP Legal Defense & Educational Fund, Inc.; National Council of Black Lawyers, *et al.*

In *Bratton v. Detroit*, 704 F.2d 878, 886, *modified*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 703 (1984) and *Detroit Police Officers Association v. Young*, 608 F.2d 671, 697 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981), the Sixth Circuit noted that a reverse discrimination claim brought by a white person is not a simple mirror image of a case involving claims of discrimination against minorities: "One analysis is required when those for whose benefit the Constitution was amended or a statute enacted claim discrimination. A different analysis must be made when the claimants are not members of a class historically subjected to discrimination. When claims are brought by members of a group formerly subjected to discrimination, the case moves with the grain of the Constitution and national policy. A suit which seeks to prevent public action designed to alleviate the effects of past discrimination moves against the grain." *See generally* Sandalow, *Judicial Protection of Minorities*, 75 Mich. L. Rev. 1162 (1977); J. Ely, *Democracy and Distrust* (1980); Ely, *The Constitutionality of Reverse Discrimination*, 41 U. Chi. L. Rev. 723, 733 (1974); Dimond & Sperling, *Of Cultural Determinism and the Limits of Law*, 83 Mich. L. Rev. 3301, 3316-20 (1985).

Article XII does move with the grain of the Constitution, while the government's approach goes against that grain.

[23] *Bakke*, 438 U.S. at 314 (Opinion of Powell, J.); *see also* Davidson, Davidson & Howard, *The Riffing of Brown: De-Integrating Public School Faculties*, 17 Harv. C.R.-C.L.L. Rev. 443, 480, 482 (1982):

> The integration of faculties serves several purposes, only one of which is to provide employment to minority teachers who have been discriminated against in the past. Minority teachers provide diverse experience and approaches that benefit all students. More importantly, they provide a presence in the classroom that instills a sense of pride and self-worth in black school children and offers a more positive image of blacks to white students as well. Together, these effects provide an education which is truly equal to minority school children. . . . In the crucial area of education the interests of school children must be paramount if true equality is to be achieved.

ination, the parties to the collective bargaining agreement had sound reasons to believe there was a value in recruiting and maintaining qualified minority teachers to benefit all students and to enrich the entire faculty.

The affirmative steps to recruit and retain minority teachers set out in Article VII of the Jackson Public Schools labor contract are a legitimate response to the history of chronic underrepresentation of minority teachers in a system with a history of previously segregated schools and are educationally sound. Indeed, as we have suggested, affirmative action designed to increase the proportion of minority teachers in a school district is quite different, and arguably substantially more justified, than affirmative action in other employment contexts.

II. THE LAY-OFF PROVISION ADOPTED THROUGH THE COLLECTIVE BARGAINING PROCESS TO IMPLEMENT THE BOARD'S INTEGRATION PROGRAM IS REASONABLE AND PROPERLY TAILORED. IT DOES NOT VIOLATE THE FOURTEENTH AMENDMENT BECAUSE IT DISTRIBUTES LAY-OFF BURDENS EQUITABLY WITHOUT SINGLING OUT ANY TEACHER FOR STIGMATIC TREATMENT ON ACCOUNT OF RACE.

In *Weber*, *Fullilove*, and *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984), this Court has expressed concern that affirmative action plans should be properly tailored. As Chief Justice Burger observed in *Fullilove*, 448 U.S. 484, however, "It is not a constitutional defect in this [affirmative action] program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such 'a sharing of the burden' by innocent parties is not impermissible."

The provisions of the collective bargaining agreement at issue in this case cannot be objected to on constitutional or equitable grounds relating to third parties. First, Petitioners have had substantial opportunity to have their interest represented during the collective bargaining process. Moreover, because the union itself voluntarily modified the seniority system, no teacher can claim to have had a legitimate expectation upset. Finally, the relevant provision is tailored to achieve the school board's important interest in integrating its faculty through a mechanism which distributes the burdens of lay-off equitably among minority and non-minority teachers.

A. Unlike *Stotts*, In The Case At Bar, Petitioners And Other Third Parties Had Repeated Opportunities To Have Their Interests Represented.

It is important to note that the duty of fair representation in collective bargaining parallels the reach of the fourteenth amendment to forbid actions that are "arbitrary, discriminatory, or in bad faith" or seek to purposefully harm individuals on account of their race. *Compare Vaca v. Sipes*, 386 U.S. 171, 190 (1967) *with Washington v. Davis*, 426 U.S. 229 (1976). Petitioners, however, never have challenged the union's adoption of Article XII through procedures established under the National Labor Relations Act. The labor agreement also has, as part of its structure, a grievance procedure with mandatory arbitration, but Petitioners did not make use of that remedy, nor did they attempt through their own union constitution to seek redress.

Petitioners have had repeated opportunities to mount such a challenge to Article XII. Despite the repeated negotiations, however, the parties closest to the factual situation in the local school district have left the language intact and have six times ratified contracts in-

cluding the Article XII provision.[24] At all times pertinent thereto, including the last agreement ratified following the grant of *certiorari* by this Court, the white teachers voting for ratification, all being members of the Jackson Education Association, constituted from 80% to 86% of the union's membership.

The Jackson Board believes that the parties at the bargaining table are the parties most responsible for determining if the language contained in the Labor Agreement, which is the subject matter of this suit, is a reasonable response to past discrimination and is educationally justified. The decision was made by experienced negotiators and ratified by the teachers. The concept arose bilaterally and was not unilaterally imposed by the Board.

The continued opportunity of Petitioners to have their interests represented either through administrative proceedings or the labor grievance process makes the equitable considerations concerning third parties here clearly distinguishable from those in *Stotts* where, as Justice White noted, "neither the Union nor the nonminority employees were parties to the suit when the . . . decree was entered." 104 S. Ct. at 2584. Justice O'Connor expressed similar concerns in her concurring opinion:

> "Absent a judicial determination . . . the company . . . cannot alter the collective-bargaining agreement *without the Union's consent.*" *W.R. Grace & Co. v. Local 751*, 461 U.S. ——, —— (1983).
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> Thus, if innocent employees are to be made to make any sacrifices in the final consent decree, *they must be represented and have had full participation rights in the negotiation process.*

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[24] September 1, 1973—August 31, 1975
September 1, 1975—August 31, 1977
September 1, 1977—August 31, 1980
September 1, 1980—August 31, 1983
September 1, 1983—August 31, 1985
September 1, 1985—August 28, 1988

104 S. Ct. at 2590 n.3 (emphasis supplied). The concerns noted by Justices O'Connor and White in *Stotts* regarding the rights of white employees who were not represented are thus wholly lacking in this case.

B. Because Article XII Involved The Voluntary Modification Of A Seniority System By The Union That Created The Prior Seniority System, The Legitimate Expectations Of Third Parties Have Not Been Upset.

In *Weber*, *Stotts*, and *Fullilove*, this Court evaluated the equities of an affirmative action program to insure that the legitimate expectations of innocent third parties were not being unnecessarily trammeled. In the case at hand, no evidence has ever been presented to suggest that the *legitimate* expectations of third parties have been upset. Neither any of the Petitioners, nor any other union member, has a legitimate expectation that the seniority provisions created through the collective bargaining process will not be modified through that same bargaining process. It is widely accepted that:

> [S]eniority rights are the creature of collective bargaining . . . what the contract confers, a later contract, validly made, may take away . . . . The notion that rights any employees . . . had under [a] contract that terminated were vested or in any other fashion sacrosanct is devoid of support in Federal labor law or contract law. . . . Seniority is not only born from the collective bargaining agreement: it does not exist apart from that contract.

Cooper v. General Motors, 651 F.2d 249, 249-51 (5th Cir. 1981).

In the same vein, this Court has ruled unanimously that it was entirely proper for a union to modify the seniority provisions of a collective bargaining agreement to give enhanced seniority to union chairpersons even though it caused the lay-off of some workers with less time at the plant. *Aeronautical Industrial District Lodge 727 v. Campbell*, 337 U.S. 521 (1949). Plaintiffs in that case had tried to argue that Section 8 of the Selective Training and Service Act of 1940 disallowed such seniority alterations because the Act gave veterans seniority at the workplace they had left for the time during which they were in the military service. This Court flatly rejected the argument because unions always have the right to alter seniority provisions in good faith and "the temporary layoff of a veteran while a non-veteran chairman with less time at the plant is retained, is wholly unrelated to the veteran's absence in the service," 337 U.S. at 528-29. The Court stated, *id.* at 526:

> Barring legislation not here involved, seniority rights derive their scope and significance from union contracts, confined, as they almost exclusively are, to unionized industry. See *Trailmobile Co. v. Whirls*, 331 U.S. 40, 53 n.21. There are great variations in the use of the seniority principle through collective bargaining bearing on the time when seniority begins, determination of the units subject to the same seniority, and the consequences which flow from seniority.[25]

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[25] *See also Local 900 IUE v. NLRB*, 727 F.2d 1184, 1189 (D.C. Cir. 1984) (permissible under NLRA to modify seniority provisions to add "layoff-and-recall superseniority" for on-the-job union officials); *Johnson v. Airline Pilots in Service of Northwest Airlines*, 650 F.2d 133, 136-37 (8th Cir.) (unions protected from complaints that timing of strikes damaged seniority and recall rights of some members), *cert. denied*, 454 U.S. 1063 (1981); *Goslowski v. Penn Central Transportation Company*, 545 F. Supp. 337 (W.D. Pa. 1982) (new contracts that caused "diminution of seniority rights" permissible when two seniority lists "dovetailed"), *aff'd mem.*, 707 F.2d 1401 (3d Cir. 1983); *Smith v. B & O Railroad Company*, 485 F. Supp. 1026, 1029 (D. Md. 1980) (merging seniority lists permissible even when it gives greater seniority rights to workers "with substantially fewer years of service" "[a]bsent a showing of fraud or hostile motivation"); *Deboles v. Trans World Airlines, Inc.*, 552 F.2d 1005, 1014 (3d Cir.) ("[S]eniority differences and seniority adjustments among employee groups . . . are within the union's discretion and judgment, so long as the seniority disadvantage is not

In *Ford Motor Company v. Huffman*, 345 U.S. 330 (1953), this Court unanimously held that in light of the broad discretion given to collective bargaining agents in devising and modifying seniority provisions, 345 U.S. at 339, and the Congressionally declared policy that "employees who left their private civilian employment to enter military service should receive seniority credit," *id.*, it was legitimate for employer and union bargaining agents to go beyond statutory provisions in granting veterans seniority credit for pre-employment military service. Although "members of [the plaintiff] class all ha[d] been laid off or furloughed from their respective employments at times and for periods when they would not have been so laid off or furloughed except for the provisions complained of in the collective bargaining agreements," the Court approved the seniority modification because it was reasonable and did not indicate that the union had failed to "make an honest effort to serve the interests of all those members without hostility to any." 345 U.S. at 337.

In approving the seniority modification in *Huffman*, the Court recognized the impossibility of devising vital provisions in a collective bargaining agreement that would not fall more harshly on some parties:

> The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

345 U.S. at 338.

The Court in *Huffman* clearly did not intend to limit its approval to those situations where the modification of seniority was sought only to give preferences to military veterans:

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the result of arbitrary reasons . . . [and] where the distinctions were found to fall within the range of reasonableness"), *cert. denied*, 434 U.S. 837 (1977).

> It is not necessary to define here the limit to which a collective-bargaining representative may go in accepting proposals to promote the long-range social or economic welfare of those it represents. Nothing in the National Labor Relations Act, as amended, so limits the vision and action of a bargaining representative that it must disregard public policy and national security. Nor does anything in the Act compel a bargaining representative to limit seniority clauses solely to the relative length of employment of the respective employees.

345 U.S. at 342.[26] More recently, this Court expressly ruled that "[t]he elimination of discrimination *and its vestiges* is an appropriate subject of bargaining [under the NLRA]." *Emporium Capwell v. Community Organization*, 420 U.S. 50, 69 (1975) (emphasis supplied).

Where a labor organization and an employer have sought *voluntarily* to adopt provisions to address such lingering vestiges, greater latitude has been given by courts than when a court-imposed remedy is at stake. For example, in *Franks v. Bowman Transportation Company*, 424 U.S. 747 (1976), the Court not only approved court-ordered remedies under Title VII which impinged on the seniority interests of third parties[27] because "em-

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[26] In rejecting the claim of a white railway employee that seniority provisions negotiated to benefit black employees violated his right to equal treatment by the labor organization, the court in *Pellicer v. Brotherhood of Railway & Steamship Clerks*, 217 F.2d 205, 207 (5th Cir. 1954), *cert. denied*, 349 U.S. 912 (1955), remarked, quoting the trial court:

> It would indeed "turn the blade inward" were this Court to hold invalid and unlawful that which appears on the face of the complaint and attached exhibits to be a good faith effort on the part of the Brotherhood and Express Company to comply with the announcements of the Supreme Court in the racial discrimination cases.

[27] While Petitioners (Br. at 11) and the Solicitor General (U.S. Br. at 28) both express a concern for the legitimate expectations of innocent parties, both also fail to mention that unlike in *Stotts*,

ployee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest," but it also emphasized:

> The Court has also held that a collective-bargaining agreement may go further, enhancing the seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement. *Ford Motor Company v. Huffman*, 345 U.S. 330 (1953). And the ability of the union and employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of the "highest priority," is certainly no less than in other areas of public policy interests.

424 U.S. at 778-79. *See also Weber*, 443 U.S. at 204-08.[28] The *Weber* Court also cited *Albemarle Paper Company v.*

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the modification of the seniority system in this case was voluntarily bargained and not court imposed; and that unlike in *Oliver v. Kalamazoo Board of Education*, 706 F.2d 757 (6th Cir. 1983), the teachers' union here voluntarily agreed to the lay-off provision and supported the Jackson Board of Education in this case. *See* Brief *Amicus Curiae* of the Jackson Education Association.

[28] The facts in the case at bar are similar to those dealt with by this Court in *Weber*. The controversy there arose from the provision of a collective bargaining agreement between the United Steelworkers of America and Kaiser Corporation, under which 50 per cent of the openings in craft training programs were reserved for blacks. Prior to this agreement, job bidding was according to strict seniority and had the impact of precluding minority promotion and transfer into more desirable job classifications. The plan negotiated in *Weber* is functionally similar to the lay-off provisions negotiated between the Jackson School Board and the Jackson Education Association in the present case. The sole difference is that the *Weber* plan affected employee seniority regarding job bidding, whereas the dispute here involves use of seniority to determine the order of staff reduction. In both *Weber* and the present case, there has been

Moody, 422 U.S. 405 (1975), in support of voluntary affirmative action between employers and unions (443 U.S. at 204):

> The very statutory words intended as a spur or catalyst to cause "employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history," *Albemarle Paper*

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a modification of a seniority system to protect minorities, whether in the context of job bidding or job retention.

In *Weber*, the most junior minority employees selected to enter the craft program had less seniority than white workers whose bids were rejected. Similarly, under the lay-off provisions negotiated between the Jackson School Board and the Jackson Education Association, there would be a retention of minority teachers having less seniority than white teachers who would be laid off. Despite a somewhat different factual setting in *Weber*, the underlying principle of that case—that seniority rights may be modified to achieve goals of equal employment opportunity—has equal force in the case at bar.

An essential feature of the Court's decision in *Weber* is recognition of the voluntary actions of employers and unions to combat discrimination, as opposed to the imposition of judicial remedies when the conduct of parties has been insufficient in achieving the goals of equal employment opportunity. "[S]ince the Kaiser-USWA plan was adopted voluntarily, we are not concerned with what Title VII requires or with what a court might order to remedy a past proven violation of the act." 443 U.S. at 200. In endorsing voluntary affirmative action plans, the Court relied upon the legislative history of Title VII in concluding that the plan in *Weber* was consistent with the goal of improved employment opportunity for minorities:

> Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with "the plight of the Negro in our economy." 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey).

443 U.S. at 202.

Company v. Moody, 422 U.S. 405, 418 (1975), cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts to hasten the elimination of such vestiges.

In the case at bar, the challenged lay-off provision is but one of several provisions that have modified past seniority rights. The agreement negotiated after recognition of the Jackson Education Association contained no lay-off language; the Board therefore was not constrained to follow any particular procedure in selecting teachers for lay-off. Inverse seniority order lay-off was adopted in the second labor agreement. In 1972 the provision now in controversy was added to the contract. A further modification in 1979 inserted the concept of certification at both the elementary and secondary levels to protect special programs and institutional needs. This latter provision has had more impact on people actually laid off than any other change in this history of bargaining between these parties.

A union has wide discretion to modify the seniority provisions to which it has previously agreed, and inasmuch as the elimination of the vestiges of past discrimination is clearly a compelling national interest [29] appro-

[29] As the House Report on the 1972 amendments extending Title VII coverage to public employers such as the Jackson Board stated:

> The problem of employment discrimination is particularly acute and has the most deleterious effect in those governmental activities which are *most visible to the minority communities* (notably education, law enforcement, and the administration of justice) with the result that the credibility of the government's claim to represent all the people is equally negated. [Emphasis supplied.]
>
> . . .
>
> Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment. . . .
>
> The committee feels that discrimination in educational institutions is especially critical. *The committee can not imagine a more sensitive area than educational institutions where the Nation's youth are exposed to a multitude of ideas that will strongly influence their future development.* To permit discrimination here would, more than in any other area, tend to promote misconceptions leading to future patterns of discrimination. [Emphasis supplied.]

H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 17, 19-20, *reprinted in* Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972* at 61, 77, 79-80 (Comm. Print 1972).

In his separate opinion in *Bakke*, Justice Blackmun stated:

> I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetrate racial supremacy.

438 U.S. at 407.

priate in the collective bargaining process, the indirect impact felt by some where a union and employer voluntarily, and in good faith, seek to overcome the lingering effects of past discrimination cannot be claimed to be the upsetting of any legitimate expectation or of a vested interest.

C. Article XII Is A Necessary Means To Achieve The Board Of Education's Compelling Remedial And Educational Interests.

Article XII was an appropriate means to effectuate the Jackson Board of Education's valid and substantial remedial and educational interests in recruiting and retaining minority teachers for its school system. Up to approximately the time period of *Brown I*, there had never been a single black teacher in the Jackson Public Schools. 546 F. Supp. at 1197. A past Superintendent of the system suggested that this resulted from school officials' deliberate policy of not hiring black teachers.[30] Of 80 teachers hired between 1964, the year that Title VII was enacted (al-

[30] *See* Read Dep. at 22-23.

though it did not then cover public school systems) and 1966, all were white. *See* J.A. 68-75 (1981 seniority list). By 1969 black teachers constituted only 3.9 per cent of the teaching staff. 546 F. Supp. at 1197. In the face of violation findings by the Michigan Civil Rights Commission concerning both student assignment and teacher hiring and assignment, the Jackson Board of Education established committees to begin grappling with this problem. A subcommittee of the Professional Staff Ad Hoc Committee found that minority teachers were deterred from working in Jackson because of community hostility and housing discrimination. *See supra* p. 6 n.5.

Under these circumstances, the Jackson Board of Education clearly could determine that it had a compelling need to actively recruit, hire and retain minority teachers. In the absence of a provision such as Article XII, however, any recruitment effort in the face of a declining student population would be doomed to fail.[31] Not only would a straight seniority system for layoffs immediately have depleted Jackson of the minority teachers it would have just hired,[32] but it further would make it

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[31] While Petitioners cite *Fort Bend Independent School District v. City of Stafford*, 651 F.2d 1133, 1140 (5th Cir. 1981) for the proposition that students are only entitled to a "sustained good faith effort to recruit minority faculty members so as to remedy the effects of any past discriminatory practices," simply recruiting minority faculty members in the face of declines in student population *and* a straight seniority lay-off system would hardly be considered a "good faith effort." As stated by Chief Justice Burger in *Davis v. Board of School Commissioners of Mobile*, 402 U.S. 33, 37 (1971), "The measure of any desegregation plan is its effectiveness."

[32] Petitioners' suggestion, Pet. Br. at 31 n.27, that Article XII was of little effect in 1981, making the difference only between a systemwide minority faculty proportion of 11% and one of 13%, is misleading and erroneous. Under the collective bargaining agreement as amended in 1979, the Board of Education took certification and special class and staffing needs into account in making lay-offs, before Article XII came into play. This language protected from

impossible to continue to recruit teachers, especially minority teachers, who would hardly be willing to move long distances to Jackson, Michigan where they would face an imminent threat of lay-off.

In light, then, of the need to offer new minority faculty recruits some security, the Jackson Board of Education negotiated Article XII at the bargaining table with the teachers' representative as a compromise under which both minority and non-minority teachers would be laid off so as not to decrease the percentage of minority teachers that existed prior to the reduction in force.[33]

Lay-offs are inherently painful. As with many economic misfortunes, they often disrupt the lives of people innocent of any personal wrongdoing. The very business of unions, however, is to confront fairly, and compromise fairly, the competing interests of all of their members concerning such matters when bargaining collectively with their employer. Recognizing the impossibility of fully satisfying every individual's interest in matters as vital as these, this Court has required only that unions and employers not fail to consider individual interests for reasons that are invidious, arbitrary, or reflect hostility toward particular individuals or groups of individuals. *Vaca v. Sipes*; *Ford Motor Company v. Huffman.*

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lay-off staff members working in bilingual programs, the elementary string music program, the painting and decorating class, two of the four distributive education teachers, three music teachers, the Latin program, and special education. Thus, in the absence of Article XII, "strict seniority" would not have been followed. In fact, because of the certification provision of the contract, in the absence of Article XII the number of minority faculty in the school system would have been drastically reduced.

[33] Petitioners clearly misstate the facts when they contend that "[t]he vast majority of the teachers were opposed to racial preferences for layoffs," Pet. Br. at 7. The response to a school administrator's questionnaire on the subject, which provides the basis for Petitioners' contention, was an expression of the view of the teachers' union that the matter was appropriately one to be handled at the bargaining table. *See supra* pp. 9-10 n.9.

When an elected school board and the elected representatives of a teachers' union decide that it is necessary to modify seniority provisions to protect, for example, the quality of a school system's music department, such a decision may have the incidental impact of harming the seniority interests of non-music teachers. Such a collectively bargained-for provision would clearly be permissible because its goal would be to enhance the musical education of the students, not to invidiously disadvantage non-music teachers. *See Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979); *Washington v. Davis*, 426 U.S. 229 (1976).

In this case, the goal of the Jackson Board of Education has been to enhance the racial and ethnic diversity of its faculty following years of serious minority underrepresentation on its staff, caused in part by a history of past discrimination. While the accomplishment of this worthy goal may have a negative, incidental impact on the seniority interests of some non-minority teachers, the layoff provision is in no way designed to harm plaintiffs because they are white, nor does it have either the purpose or effect of stigmatizing, or implying inadequacy in any way, of any of the minority or non-minority teachers who are laid off.[34] It is therefore a permissible affirmative action measure under the fourteenth amendment.

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[34] *See United Jewish Organizations v. Carey*, 430 U.S. 144 (1977). In an opinion joined by Justices Stevens and Rehnquist, Justice White stated:

> There is no doubt that in preparing the 1974 legislation, the State *deliberately used race in a purposeful manner. But its plan presented no racial slur or stigma with respect to whites or any race, and we discern no discrimination violative of the Fourteenth Amendment* nor any abridgement of the right to vote on account of race within the meaning of the Fifteenth Amendment.

430 U.S. at 165.

III. THE DISTRICT COURT WAS CORRECT IN DENYING PETITIONERS' MOTION FOR SUMMARY JUDGMENT AND CORRECT IN GRANTING THE JACKSON BOARD OF EDUCATION'S MOTION FOR SUMMARY JUDGMENT.

In the procedural posture in which this case arose, the District Court was correct in denying Petitioners' motion for summary judgment under Rule 56 and in granting the Jackson Board of Education's summary judgment motion.

A. Petitioners' Summary Judgment Motion.

Petitioners could only have been entitled to summary judgment at this early stage in the litigation if no genuine issue of fact had existed concerning the constitutionality of the lay-off provision when the underlying facts were viewed in the light most favorable to the Jackson Board of Education. In order for the District Court properly to have granted petitioners' motion for summary judgment, the court would have had to hold, as a matter of law, that all voluntary, collectively bargained, race-conscious provisions adopted by a local school board amount to *per se* violations of the Constitution—regardless of the purpose and state interest motivating the voluntary adoption of the provision.

To have made such a ruling, the district court would have had to simply ignore the several decisions in which this Court based its judgments on the facts, context, purpose and governmental importance of the disputed program. *See Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982); *Minnick v. California Department of Corrections*, 452 U.S. 105 (1981); *Fullilove; Bakke.*

Petitioners *now* make several factual allegations which, if they had been proved at trial, might have lent support to their claims. However, these assertions are only con-

tentions: None of them was supported below by the required affidavits or other materials, none of them has any basis in the record before this Court, and none was ever agreed to by the Jackson Board. In fact, Petitioners never articulated a single historical fact concerning the origins of the lay-off provision, even in the 1½-page statement of facts contained in their District Court brief supporting their motion for summary judgment. Since, as we have shown above, Petitioners' categorical legal argument against race-conscious action in the absence of prior judicial findings is wrong, their mere naked contentions could not provide a basis for prevailing on their summary judgment motion, especially since they conceded the facts proferred by the Board of Education.

B. Jackson Board Of Education's Motion For Summary Judgment.

While the Jackson School Board did not produce affidavits detailing the evidence of its own prior discrimination and its adoption of institutional goals with respect to Article XII, the Board did rely, in the District Court, on the fact that Petitioners did not dispute such facts but only the inferences which could properly be drawn from them.[36] This understanding was confirmed at the oral argument before the district judge.[37] Thus, while Petitioners have sought in this Court to portray the lay-off

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[36] Once Petitioners stipulated to these facts, disposition of the Board's motion was governed by the provision of F.R. Civ. P. 56(e) which states that

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

[37] *See supra* pp. 2-3 & n.2.

provision as a response simply to past generalized societal discrimination, the Jackson Board of Education, the District Court, and the Court of Appeals correctly understood that the provision was an integral part of the Jackson Board's voluntary effort to eradicate all vestiges of its own past discriminatory conduct and to provide a fully integrated system of public schooling.[38]

At the time the cross-motions were filed at the District Court level, the Jackson Board of Education had been involved in serious efforts voluntarily to complete the integration of its school system for almost a decade. This extensive voluntary effort was due in part to a desire to avoid the divisiveness and discomfort that comes not only from prolonged litigation, but also from having to flail oneself publicly by detailing every aspect of one's own wrongdoing. Had it been necessary, however, the Jackson Board of Education stood ready to produce additional evidence of discrimination at a trial.[39]

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[38] In the statement of facts contained in the Board's brief in support of its summary judgment motion, set forth *verbatim supra* at pp. 3-15, and which District Judge Joiner described as "not disputed by plaintiffs," 546 F. Supp. at 1197, the grounds for the Board of Education's action with respect to the negotiation and adoption of Article XII are explicitly stated:

> Various complaints had been filed to the Michigan Civil Rights Commission by the Jackson NAACP alleging segregation of elementary schools as well as discriminatory treatment of minorities in *staff hiring and placement. Efforts to integrate the elementary schools and to set up increased minority hiring were prompted in part by these complaints.*
>
> . . .
>
> The leadership [of the teachers' union] explained that a staff racial mix was educationally sound and that the system needed black teachers. It was also noted that the new layoff policy was partially designed to correct past discriminatory policies.

Jackson Board of Education Brief in Support of Motion for Summary Judgment, at 1-5 (emphasis supplied).

[39] *See id.* at 35.

The Board of Education believed (as did the District Court [40] and the Court of Appeals [41]) that its summary judgment motion should be granted because the Jackson Board was acting in a remedial context in which race-conscious educational policies, such as the lay-off provision, are educationally and constitutionally sound. If dispute does exist as to the underlying facts motivating the adoption of this provision, the Jackson Board of Education still stands ready to produce more detailed evidence in a trial on remand.

The Board believes, however, that there must exist another option for a school board which wishes to eradicate all vestiges of its own past discrimination besides waiting to be sued or being forced to detail the facts of one's own past discrimination. By taking voluntary action once a valid complaint had been filed with the Michigan Civil Rights Commission, the Jackson Board of Education avoided prolonged litigation, substantial claims for back pay, and court-imposed remedies, and instead allowed the members of its own community to work out the appropriate solutions by involving citizen committees, using collective bargaining and compromise, and resting upon the forthright commitment of a duly elected local board of education. Considering the shameful legacy of recalcitrance that followed *Brown II*, and this Court's traditional deference to the decisions of local school authorities, the good-faith, voluntary use of a reasonable and properly tailored race-conscious provision by a school board should not be overturned or second-guessed where that school board presents and acts upon a plausible showing of past discrimination.[42]

[40] The District Court noted that "societal discrimination" could justify a belief by educators that it is an important and substantial government interest to have black teachers to serve as role models for students; but the District Court did not rely solely on this justification. Rather, it adopted a "reasonableness" test from *Detroit Police Officers Association v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981), which asks whether the voluntary affirmative action plan is " 'substantially related' to the objectives of remedying past discrimination and correcting 'substantial' and 'chronic' underrepresentation." 546 F. Supp. at 1199-1200. On the basis of this test, the lay-off provision was upheld.

[41] The Sixth Circuit found that "[t]he school board (and the bargaining representative of the teachers) have a legitimate interest in *curing the past racial isolation of black teachers in the school system concerned.*" 746 F.2d at 1157 (emphasis supplied). The Court of Appeals also stated that "the Board of Education and its bargaining agent had a legitimate interest in the *remedial* plan which was jointly adopted. Here *the school board's interests in eliminating historic discrimination*, promoting racial harmony in the community and providing role models for minority students are among the justifications available to support the layoff provisions." *Id.* (emphasis supplied).

CONCLUSION

WHEREFORE, for the foregoing reasons, Respondents pray that the judgment below be affirmed.

Respectfully submitted,

JEROME A. SUSSKIND
JEROME A. SUSSKIND, P.C.
2530 Spring Arbor Road
Jackson, Michigan 49203-3696
(517) 787-5340
Attorney for Respondents *

August 23, 1985

[42] In April, 1972, the Jac. on Board of Education circulated the following statement to parents to explain its reasons for taking voluntary desegregation action:

> Waiting for what appears the inevitable only flames the passions and contributes to the difficulties of an orderly transition from a segregated to a desegregated school system. Firmly established legal precedents mandate a change. Many citizens know this to be true. Waiting for a court order emphasizes to many that we are quite willing to disobey the law until the court orders us not to disobey the law.

Plaintiffs' Exhibit No. 8, *Jackson I*, question 4.

* Respondents' counsel wishes to acknowledge the substantial assistance of Gene Sperling, a 1985 graduate of Yale Law School, in the preparation of this brief.